98 (2)

FILED
JUN 3 0 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 07-1485

In the Supreme Court of the United States

WARDEN HUGH SMITH AND SANCHE MARTIN,
Petitioners

v.

JAMIL AL-AMIN,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF THE STATES OF PENNSYLVANIA, ALABAMA, ALASKA, COLORADO, DELAWARE, FLORIDA, HAWAII, ILLINOIS, KANSAS, MICHIGAN, MISSISSIPPI, MISSOURI, MONTANA, NEW HAMPSHIRE, NEW MEXICO, NORTH CAROLINA, NORTH DAKOTA, OKLAHOMA, OREGON, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, TEXAS, UTAH, VIRGINIA, WASHINGTON, and WYOMING, and THE COMMONWEALTH OF PUERTO RICO, AS *AMICI CURIAE* IN SUPPORT OF THE PETITION

THOMAS W. CORBETT, JR.
Attorney General
Commonwealth of Pennsylvania

JOHN G. KNORR, III
Chief Deputy Attorney General

CLAUDIA M. TESORO*
Senior Deputy Attorney General
**Counsel of Record*

[Additional Counsel Listed Inside]

Office of Attorney General
21 South 12th St., 3d Fl.
Philadelphia, Pa. 19107
(215) 560-2908

Troy King
Attorney General of Alabama
11 South Union Street
Montgomery, AL 36130
(334) 242-7401

Talis J. Colberg
Attorney General of Alaska
P.O. Box 110300
Juneau, AK 99811
(907) 465-3600

John W. Suthers
Attorney General of Colorado
1525 Sherman Street, Seventh Floor
Denver, CO 80203
(303) 866-3052

Joseph R. Biden, III
Attorney General of Delaware
820 N. French Street
Wilmington, DE 19801
(302) 577-8338

Bill McCollum
Attorney General of Florida
The Capitol, PL-01
Tallahassee, FL 32399
(850) 414-3300

Mark J. Bennett
Attorney General of Hawaii
425 Queen Street
Honolulu, HI 96813
(808) 586-1500

Lisa Madigan
Attorney General of Illinois
100 West Randolph Street
Chicago, IL 60601
(312) 814-3000

Stephen N. Six
Attorney General of Kansas
120 S.W. 10th Avenue, Room 200
Topeka, KS 66612
(785) 296-2215

Michael A. Cox
Michigan Attorney General
P.O. Box 30212
Lansing, MI 48909
(517) 373-1110

Jim Hood
Attorney General of Mississippi
P.O. Box 220
Jackson, MS 39205
(601) 359-3680

Jeremiah W. (Jay) Nixon
Attorney General of Missouri
Supreme Court Building
207 West High Street
Jefferson City, MO 65101
(573) 751-3321

Mike McGrath
Attorney General of Montana
P.O. Box 201401
Helena, MT 59620
(406) 444-2026

Kelly A. Ayotte
Attorney General of New Hampshire
33 Capitol Street
Concord, NH 03301
(603) 271-1201

Gary K. King
Attorney General of New Mexico
P.O. Drawer 1508
Santa Fe, NM 87504
(505) 827-6000

Roy Cooper
Attorney General of North Carolina
P.O. Box 629
Raleigh, NC 27602
(919) 716-6400

Wayne Stenehjem
Attorney General of North Dakota
600 E. Boulevard Avenue
Bismarck, ND 58505
(701) 328-2210

W.A. Drew Edmondson
Attorney General of Oklahoma
313 N.E. 21st Street
Oklahoma City, OK 73105
(405) 521-3921

Hardy Myers
Attorney General of Oregon
1162 Court Street, NE
Salem, OR 97301
(503) 378-4732

Roberto J. Sanchez-Ramos
Secretary of Justice
Commonwealth of Puerto Rico
P.O. Box 9020192
San Juan, PR 00902
(787) 721-2900

Henry D. McMaster
South Carolina Attorney General
P.O. Box 11549
Columbia, SC 29211
(803) 734-3970

Lawrence E. Long
Attorney General of South Dakota
1302 E. Highway 14, Suite 1
Pierre, SD 57501
(605) 773-3215

Robert E. Cooper, Jr.
Attorney General of Tennessee
P.O. Box 20207
Nashville, TN 37202
(615) 741-5860

Greg Abbott
Attorney General of Texas
P.O. Box 12548
Austin, TX 78711
(512) 463-2100

Mark L. Shurtleff
Utah Attorney General
Utah State Capitol, Suite #230
P.O. Box 142320
Salt Lake City, UT 84114
(801) 538-9600

Robert F. McDonnell
Attorney General of Virginia
900 East Main Street
Richmond, VA 23219
(804) 786-2071

Robert M. McKenna
Attorney General of Washington
1125 Washington Street
P.O. Box 40100
Olympia, WA 98504
(360) 753-6200

Bruce A. Salzburg
Attorney General of Wyoming
State Capitol Building
Cheyenne, WY 82002
(307) 777-7841

QUESTION PRESENTED

This *amicus* brief addresses the following issue:

Do prison officials violate inmates' First Amendment free speech rights by opening and inspecting – but not reading – the inmates' incoming legal mail outside their presence?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

INTEREST OF THE *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 2

I. Inmates' Use Of The Mail, Including Legal Mail, To Acquire Contraband And Otherwise Undermine Institutional Security, Is A Persistent Problem. 4

II. The Courts Of Appeals Have Rendered Inconsistent Decisions On Whether Inmates Have A Freestanding First Amendment Right To Be Present When Their Incoming Legal Mail Is Opened And Inspected 9

III. There Is No Constitutional Basis For Requiring Inmates' Incoming Legal Mail To Be Opened And Inspected In Their Presence. 14

CONCLUSION 19

TABLE OF AUTHORITIES

Page

Cases

Al-Amin v. Smith,
511 F.3d 1317 (11th Cir. 2008).....10, 12

Antonelli v. Sheahan,
81 F.3d 1422 (7th Cir. 1996).....10, 13

Beard v. Banks,
126 S.Ct. 2572 (2006).....17

Bell v. Wolfish,
441 U.S. 520 (1979).....14, 18

Bieregu v. Reno,
59 F.3d 1445 (3d Cir. 1995).....10, 11, 12, 13

Block v. Rutherford,
468 U.S. 576 (1984).....18

Boswell v. Mayer,
169 F.3d 384 (6th Cir. 1999).....11, 13

Brewer v. Wilkinson,
3 F.3d 816 (5th Cir. 1993), *cert. denied*, 510 U.S.
1123 (1994).....12

Brown v. Dep't of Corrections,
932 A.2d 316 (Pa. Cmwlth. 2007).....7

Commonwealth v. Guilford,
No. 871 Criminal 2003 (Somerset Co. Court of Common Pleas) 8

Davis v. Goord,
320 F.3d 346 (2d Cir. 2003) 11

Felton v. Lincoln,
429 F. Supp.2d 226 (D. Mass. 2006) 7, 8, 9

Fontroy v. Beard,
No. 02-2949, 2007 WL 1289936 (E.D. Pa. May 3, 2007), *appeal docketed*, No. 07-2446 (3d Cir. May 22, 2007) 7

Gardner v. Howard,
109 F.3d 427 (8th Cir. 1997) 14

Harper v. Beard, No. 05-1803, 2007 U.S. Dist. Lexis 55044 (E.D. Pa. Apr. 23, 2007), *appeal docketed*, No. 07-2347 (3d Cir. May 3, 2007) 6, 7

Harrod v. Halford,
773 F.2d 234 (8th Cir. 1985), *cert. denied*, 476 U.S. 1143 (1986) 13

Hudson v. Palmer,
468 U.S. 517 (1984) 18

Jones v. Brown,
461 F.3d 353 (3d Cir. 2006), *cert. denied*, 127 S.Ct. 1822 (2007) 11

Jones v. N.C. Prisoners' Labor Union,
433 U.S. 119 (1989) 17

Kaufman v. Karlen,
No. 06-C-205-C, 2007 WL 1821098, (W.D. Wis. June 21, 2007) 13

Kaufman v. Karlen,
No. 07-2712, 2008 WL 744140 (7th Cir. March 20, 2008) 12

Keenan v. Hall,
83 F.3d 1083 (9th Cir. 1996) 14

Lewis v. Casey,
518 U.S. 343 (1996) 10, 11

Lewis v. Cook County Bd. of Commissioners,
6 Fed. Appx. 428 (7th Cir. 2001) 12

Martin v. Brewer,
830 F.2d 76 (7th Cir. 1987) 14

McCain v. Reno,
98 F. Supp.2d 5 (D. D.C. 2000) 14

McDonnell v. Wolff,
483 F.2d 1059 (8th Cir. 1973) 15

Moore v. Ciccone,
459 F.2d 574 (8th Cir. 1972) 15

Morgan v. Montanye,
516 F.2d 1367 (2d Cir. 1975) 10

Muhammad v. Pitcher,
35 F.3d 1081 (6th Cir. 1994) 13

Newman v. Beard,
No. 06-214, 2008 WL 2149605 (W.D. Pa. May 21, 2008), *appeal docketed*, No. 08-2652 (3d Cir. June 16, 2008) 7

O'Keefe v. Van Boening,
82 F.3d 322 (9th Cir. 1996) 17

Oliver v. Fauver,
118 F.3d 175 (3d Cir. 1997) 10-11

Overton v. Bazetta,
539 U.S. 126 (2003) 16

Pennsylvania v. Finley,
481 U.S. 551 (1987) 16

Procunier v. Martinez,
416 U.S. 396 (1974) 4

Robinson v. Dep't of Corrections,
No. 03-5180, 2007 WL 210096 (Jan. 23, 2007), *appeal docketed*, No. 07-1465 (3d Cir. Feb. 15, 2007) 6, 7

Sallier v. Brooks,
343 F.3d 868 (6th Cir. 2003) 11, 13

Smith v. Maschner,
899 F.2d 940 (10th Cir. 1990) 10

Smith v. Robbins,
328 F. Supp. 162 (D. Me. 1971), *aff'd in relevant part*, 454 F.2d 696 (1st Cir. 1972) 14, 15

Smith v. Robbins,
454 F.2d 696 (1st Cir. 1972) 15, 16

Spaulding v. Collins,
867 F. Supp. 499 (S.D. Tex. 1993).....8

State v. Steffes,
260 Wis.2d 841, 659 N.W.2d 445 (2003) 5

Swidler & Berlin v. United States,
524 U.S. 399 (1998).....16

Taylor v. Oney,
196 Fed. Appx. 126 (3d Cir. 2006).....11

Thornburgh v. Abbott,
490 U.S. 401 (1989).....4

Turner v. Safley,
482 U.S. 78 (1987).....4

United States v. Stotts,
925 F.2d 83 (4th Cir. 1991).....8

United States v. Young,
146 Fed. Appx. 824 (6th Cir. 2005) 6, 9

Upjohn Co. v. United States,
449 U.S. 383 (1981).....16

Vasquez v. Raemisch,
480 F. Supp.2d 1120 (W.D. Wis. 2007).....13

West v. Endicott,
No. 06-C-763, 2008 WL 906225 (E.D. Wis. March 31, 2008).....13

Wolff v. McDonnell,
418 U.S. 539 (1974) 5, 9, 10, 13, 15, 16

Constitutional Provisions

U.S. CONST. amend. I (First Amendment) 1, 2, 4. 9, 10, 11, 18

U.S. CONST. amend. VI (Sixth Amendment) 3. 14. 15, 16

Statutes

42 U.S.C. § 1983 6

Regulations

Kan. Admin. Regs. 44-12-601(c) 5

N.C. Admin. Code tit. 5, r. 2D.0307(f) 5

Or. Admin. r. 291-131-0030 5

37 Pa. Code § 93.2(e) 5

Rules

Sup.Ct.R. 37.2(a) 1

Other Authorities

Asha Bandele, *The Prisoner's Wife: A Memoir* (1999) 17

Gregory Gearhart, *Controlling Contraband*, CORRECTIONS TODAY, Oct. 2006 6

Heath C. Hoffmann, *et al.*, *Communication Policy Changes in State Adult Correctional Facilities From 1971 to 2005*, CRIMINAL JUSTICE REVIEW (2007) 17

Thomas Mott Osborne, *Prisons and Common Sense* (1924) 5

INTEREST OF THE *AMICI CURIAE* [1]

Amici curiae – Pennsylvania, 26 other States, and the Commonwealth of Puerto Rico – urge the Court to grant certiorari in this case, to resolve a constitutional issue that affects the day-to-day operation of prisons and jails throughout the country: Do inmates have a free-standing First Amendment right – distinct from their right of access to courts or any other recognized right – to be present when their incoming "legal mail" is opened and inspected for contraband? The Eleventh Circuit says that they do, but the courts of appeals have rendered conflicting decisions on whether such a right exists. There is further disagreement among the circuits over exactly what kinds of mail warrant this kid glove treatment.

Running safe, secure, and orderly prisons is one of the most difficult tasks that state governments undertake. By definition, the introduction of contraband into correctional institutions jeopardizes institutional security, and one of the time-honored ways that inmates acquire contraband is through the mail – including legal mail, or what appears to be legal mail. Requiring that prisoners' legal mail be handled by special procedures – that is, set aside, then opened and inspected in each prisoner's immediate presence, rather than in a secure mailroom – renders the entire mail-screening and delivery process less effective and less efficient. It increases the likelihood that contraband will find its way into

---

[1] As required under Sup.Ct.R. 37.2(a), counsel of record for all parties received notice at least ten days prior to the applicable due date of the *amicus curiae's* intention to file this brief.

inmates' hands and, at the same time, diverts prison resources away from other needs. The associated cost to the States is significant, and there is no corresponding constitutional benefit to justify it.

SUMMARY OF ARGUMENT

I. Contraband enters prisons in various ways, including by mail, even legal mail. Prison officials do not read inmates' incoming legal mail; at most they glance at it to ascertain that it is indeed legal. But especially in this era of computers and laser printers, inmates and their confederates can easily make non-legal mail look like genuine legal mail. Unscrupulous inmates capitalize on this, to the detriment of the prison system as a whole. Where prison officials are required to open and inspect incoming legal mail in the inmates' presence, all apparent legal mail automatically gets past the prison's secure perimeter and into inmate-populated areas before being opened. There, with each inmate-addressee at the responsible officer's or employee's elbow, and with everything else that, of necessity, goes on "inside the walls," legal mail – real or phony – cannot be inspected as carefully as it would be in a more remote mailroom, where mail processing is the sole focus. Consequently, more contraband escapes, or may escape, detection. And the more kinds of mail that must be handled in this manner, the higher the odds that unauthorized items and non-genuine documents will slip through.

II. The constitutional issue presented here has not come before the Court since 1974, and even then the Court dealt with it only obliquely. The courts of appeals are divided. In holding that inmates have a distinct free speech right under the First Amendment

to be present when their legal mail is opened and inspected, the Eleventh Circuit joined the Third Circuit. Although not quite as blunt, decisions from the Second and Sixth Circuits mesh with those of the Eleventh and Third on this point. On the other hand, the Fifth and Seventh Circuits do not recognize any free speech cause of action, based on the opening of an inmate's legal mail outside his presence. To make matters worse, the lower courts also disagree on whether anything other than pure attorney-client mail, such as court mail, constitutes "legal mail" for this purpose. Given these inconsistencies, the States and the lower courts need guidance from the Court on what the Constitution does and does not require with regard to the processing of inmates' incoming legal mail.

III. Even if there are advantages, from a policy standpoint, to opening and inspecting inmates' incoming legal mail in their presence, it is not mandatory as a matter of constitutional law. Today's policies had their genesis in concerns about inmates' Sixth Amendment right to counsel in criminal prosecutions, but they were long ago cut loose from that constitutional mooring and cannot be justified under any possible reading of the Sixth Amendment. The policies were first adopted to soothe inmates' (and attorneys') "apprehensions," with minimal regard for prison officials' security concerns – an approach that is backwards by today's standards and that, logically, would require similar handling of other sensitive mail that has never been accorded the same treatment legal mail gets.

REASONS FOR GRANTING THE PETITION

I. Inmates' Use Of The Mail, Including Legal Mail, To Acquire Contraband And Otherwise Undermine Institutional Security, Is A Persistent Problem.

Prisoners are entitled to use the mail, *see Procunier v. Martinez*, 416 U.S. 396, 412-413 (1974), but they are not entitled to misuse it. By recognizing a discrete First Amendment right for inmates to be physically present whenever their incoming legal mail is opened and inspected, the Eleventh Circuit made it more difficult for prison officials to discover and deal with incidents of misuse.

Inmates' general right to send and receive mail is not absolute. The Court has recognized that, for security reasons, prison officials may regulate or prohibit some categories of incoming inmate mail without violating the First Amendment. *See Thornburgh v. Abbott*, 490 U.S. 401, 412 (1989) (noting "potential for coordinated disruptive conduct" if certain incoming publications circulate among prisoners); *Turner v. Safley*, 482 U.S. 78, 91 (1987) (ban on inmate-to-inmate correspondence is rational because "communication with other felons is a potential spur to criminal behavior"). Security concerns animate other aspects of mail processing too. At issue in this case is whether, as the Eleventh Circuit and several other circuits have held, there is a First Amendment basis for giving preferential treatment to incoming legal mail, notwithstanding the implications for institutional security.

That inmates may obtain contraband by mail cannot be gainsaid. In the early part of the last century, a prison reformer catalogued the many ways

that "dope" got into Sing Sing prison, one being that "it was concealed in books, magazines, postcards and letters[.]" Thomas Mott Osborne, *Prisons and Common Sense* 86 (1924). He added, "The ingenuity of man was exhausted in finding new ways to overreach the authorities; and the brains of the authorities were taxed to the utmost without being able to cope with the evil." *Id.*, at 87.

Inspecting incoming mail is one method by which prison officials continue to try to "cope with the evil" of drugs and other illicit items being sent to inmates. And, as the Court has observed, "The possibility that contraband will be enclosed in letters, *even those from apparent attorneys*, surely warrants prison officials' opening the letters." *Wolff v. McDonnell*, 418 U.S. 539, 577 (1974) (emphasis added). Thus, incoming legal mail, identifiable as such, may be opened and inspected – though not read. *See Id.*, 418 U.S. at 576 ("freedom from censorship is not equivalent to freedom from inspection or perusal").[2]

The States' experience confirms this Court's observation about the need to open and inspect incoming mail, even items "from apparent attorneys." Actual contraband may be secreted in what appears to be legal mail. In *State v. Steffes*, 260 Wis.2d 841, 659 N.W.2d 445 (2003), for instance, a Wisconsin inmate was investigated and prosecuted for solicitation to

---

[2] There are limited circumstances under which mail, and even legal mail, may be read, such as when officials obtain permission from superiors to monitor and read the mail of a particular inmate who is suspected of wrongdoing, but prison officials do not read or censor everyone's mail on a routine basis. *See, e.g.*, 37 Pa. Code § 93.2(e); Or. Admin. r. 291-131-0030; N.C. Admin. Code tit. 5, r. 2D.0307(f); Kan. Admin. Regs. 44-12-601(c).

deliver marijuana to another prisoner. Per their agreement, the inmate's unincarcerated brother had flattened marijuana between sheets of paper, which he then mailed to the inmate in an envelope marked "legal papers," purporting to be from the Public Defender's office. A similar scam, involving marijuana coming into an Arizona jail by mail under a fictitious attorney's name, is described in Gregory Gearhart, *Controlling Contraband,* CORRECTIONS TODAY, Oct. 2006.

Besides drugs, other forms of contraband have also been smuggled into prisons using the mail. In *United States v. Young*, 146 Fed. Appx. 824 (6th Cir. 2005), the defendant and three other inmates had enlisted the help of a friend outside to purchase a hacksaw blade, conceal it in the binding of a legal pad, and mail it to the defendant in an envelope bearing an attorney's actual return address label (which the defendant had procured and sent to the friend for this purpose). *Id.*, at 826. More dramatically still, in 1999 a convicted murderer succeeded in escaping from a maximum security Pennsylvania prison, using tools that were believed by corrections officials to have been smuggled into the institution in a hollowed out section of a legal brief, which had been sent to another inmate and passed to the murderer. *See Harper v. Beard*, No. 05-1803, 2007 U.S. Dist. Lexis 55044, at *32-33 (E.D. Pa. Apr. 23, 2007), *appeal docketed*, No. 07-2347 (3d Cir. May 3, 2007); *Robinson v. Dep't of Corrections*, No. 03-5180, 2007 WL 210096, at *4-5 (Jan. 23, 2007), *appeal docketed*, No. 07-1465 (3d Cir. Feb. 15, 2007).[3]

---

[3] *Harper* and *Robinson* involved mail-related claims brought under 42 U.S.C. § 1983. As recounted in the cited decisions, after [footnote continued ...]

And there is another dimension to legal-mail-related problems in modern correctional institutions. The ingenuity of today's inmates is no less than that of their Sing Sing counterparts in the 1920s, and today's inmates (and their confederates) have access to something their predecessors did not have: word processors and printers. With such equipment, they can create envelopes with ostensibly "legal" return addresses and markings, indistinguishable from true law office stationery. Whatever is sealed inside these envelopes typically will be processed as legal mail, even if it isn't. So stated the inmate plaintiff in *Felton v. Lincoln*, 429 F. Supp.2d 226 (D. Mass. 2006), who was disciplined for circumventing mail regulations. To obtain prohibited hate literature, he urged an outside accomplice to send it to him in the guise of legal mail, explaining, "You do that by making an envelope on your computer with a return address of a lawyer, like this [example in letter]. Don't use this return address, just make one up." *Id.*, 429 F. Supp.2d at 235 (alteration in opinion). This ruse works, the inmate continued, because it "makes it so they have to open it

---

the 1999 escape, the Pennsylvania Department of Corrections conducted a thorough investigation and compiled a separate, special report on contraband and legal mail, describing a variety of longstanding problems and abuses. Eventually the department revised its legal mail policy in certain respects, tightening the circumstances under which incoming legal mail would be inspected in inmates' presence. The policy revisions were found constitutional in *Harper* and *Robinson* and, more recently, in *Newman v. Beard*, No. 06-214, 2008 WL 2149605, at *3-4 (W.D. Pa. May 21, 2008), *appeal docketed*, No. 08-2652 (3d Cir. June 16, 2008), as well as in *Brown v. Dep't of Corrections*, 932 A.2d 316 (Pa. Cmwlth. 2007), but they were invalidated in *Fontroy v. Beard*, No. 02-2949, 2007 WL 1289936 (E.D. Pa. May 3, 2007), *appeal docketed*, No. 07-2446 (3d Cir. May 22, 2007).

in my presence and can't read it for any reason... I've had my friends send me material this way for years, in state and county facilities in Jersey, NY, MD, and at this jail, and have never had a problem." *Id.*

Similarly, it is now easier than ever for inmates and those who cooperate with them to fabricate bogus legal documents that appear legitimate but aren't. *Cf. Spaulding v. Collins*, 867 F. Supp. 499, 501 (S.D. Tex. 1993) (inmate disciplined for "originating and possessing" forged court order). One enterprising Pennsylvania inmate created a court order reducing his sentence, along with an appropriate cover letter, and arranged for these documents to be mailed to officials at his prison in an envelope bearing the trial court's return address. *Commonwealth v. Guilford*, No. 871 Criminal 2003 (Somerset Co. Court of Common Pleas). He was convicted of forgery and other charges, and the testimony at his criminal trial revealed that his stunt was not unique; the defendant-inmate had been tutored by another inmate, who had done the same thing himself.

For prison officials, these problems are exacerbated if legal mail is defined to encompass not only attorney-client mail but also mail from courts and other types of "official" mail. If more categories of mail are deemed legal, the volume of apparent legal mail that must be opened and inspected amidst distractions, away from the mailroom (and by staff who are less likely to be mail "specialists"), is that much greater, as is the potential for legal-mail-related security breaches. *Cf. United States v. Stotts*, 925 F.2d 83, 87 (4th Cir. 1991) (when legal mail is opened in inmate's presence, "any contraband in the envelope would be within reach of the inmate," and "prisoner's obvious temptation to attempt to obtain scarce contraband may place the officer opening the mail at

risk;" risk increases as volume of specially-handled mail increases).

Inmates, like the plotters in *United States v. Young*, are well aware that legal mail is handled more solicitously than regular mail. *Id.*, 146 Fed. Appx. at 826 (inmates "knew that legal mail was always opened in the presence of the prisoner and that it was scrutinized less closely by the guards"). They seek to exploit this vulnerability. *Id. See also Felton v. Lincoln*, 429 F. Supp.2d at 235 & n.4.

While the particular security breaches summarized above were uncovered and addressed, undoubtedly many others are not. It is impossible to know how often this occurs. Just as surely, it would happen less if prison officials were not constrained to open and inspect every item of incoming legal mail in the inmate addressee's immediate presence, rather than in a secure, appropriately staffed mailroom. Where incoming legal mail is inspected, and by whom, does make a difference.

II. The Courts Of Appeals Have Rendered Inconsistent Decisions On Whether Inmates Have A Freestanding First Amendment Right To Be Present When Their Incoming Legal Mail Is Opened And Inspected.

Wolff v. McDonnell, 418 U.S. 539 (1974), was the Court's only opportunity, to date, to consider the scope of any constitutional right inmates may have to be present when their incoming legal mail is opened and inspected. The Court ultimately concluded, however, that it was unnecessary to decide "which, if any, of the asserted rights are operative" in that context. *Id.*, at 576. Instead, the Court held only that, by allowing inmates to be "present when mail from attorneys is

inspected," prison officials had "done all, and perhaps even more, than the Constitution requires." *Id.*, at 577.

Following *Wolff*, various mail-opening claims made their way to the courts of appeals, and were analyzed, *inter alia*, in access-to-courts terms. *E.g.*, *Antonelli v. Sheahan*, 81 F.3d 1422, 1430 (7th Cir. 1996); *Bieregu v. Reno*, 59 F.3d 1445, 1452-1456 (3d Cir. 1995); *Smith v. Maschner*, 899 F.2d 940, 944 (10th Cir. 1990); *Morgan v. Montanye*, 516 F.2d 1367, 1371-1372 (2d Cir. 1975). In the wake of *Lewis v. Casey*, 518 U.S. 343 (1996), however, and *Lewis's* requirement that inmates prove "actual injury," the access-to-courts theory has lost whatever attractiveness it may once have had for inmates. The question now is whether an inmate whose legal mail is opened outside his presence can get anywhere via another constitutional route. Addressing that question, the courts of appeals have taken different paths.

In this case, the Eleventh Circuit concluded that respondent "has a First Amendment free speech right to communicate with his attorneys by mail, separate and apart from his constitutional right to access to the courts." *Al-Amin v. Smith*, 511 F.3d 1317, 1334 (11th Cir. 2008). In the Eleventh Circuit's view, opening respondent's attorney mail outside his presence contravened that right. *Id.*

The Eleventh Circuit expressly aligned itself with the Third Circuit. *See Al-Amin*, 511 F.3d at 1334. In *Bieregu*, 59 F.3d at 1456, 1458, the Third Circuit had held that repeatedly opening an inmate's properly marked incoming "court mail" outside his presence violates both his First Amendment right to free speech and his constitutional right of access to the courts. After *Lewis*, the access-to-courts aspect of *Bieregu* became untenable, *see Oliver v. Fauver*, 118

F.3d 175 (3d Cir. 1997), but the Third Circuit has steadfastly reaffirmed *Bieregu's* free speech holding, *see Jones v. Brown*, 461 F.3d 353, 359 (3d Cir. 2006), *cert. denied*, 127 S.Ct. 1822 (2007); *Taylor v. Oney*, 196 Fed. Appx. 126, 128 (3d Cir. 2006).

Since *Lewis*, the Second and Sixth Circuits have rendered decisions that are consistent with those of the Eleventh and the Third on this point. They too permit inmates whose incoming legal mail was inspected outside their presence to bring constitutional challenges, unburdened by the actual injury requirement that is part and parcel of an access-to-courts claim.

The Second Circuit differentiates between the right of access to courts and the right to send and receive mail. *Davis v. Goord*, 320 F.3d 346, 351 (2d Cir. 2003). It also recognizes that "a prisoner has a right to be present when his legal mail is opened." *Id.* A violation of the latter right amounts to a violation of the broader right to send and receive mail if the inmate establishes "an ongoing practice by prison officials of interfering with his mail" (or "harm" attributable to mail tampering). *Id.*, at 352. Similarly, in the Sixth Circuit, an inmate has a "First Amendment right to receive mail, especially correspondence that impacts upon or has import for the prisoner's legal rights, the attorney-client privilege, or the right of access to the courts." *Sallier v. Brooks*, 343 F.3d 868, 874 (6th Cir. 2003). And according to that court, opening legal mail outside a prisoner's presence is unjustified, and therefore actionable under the First Amendment, "when the prisoner has specifically requested otherwise." *Id.*, at 877-878. *See also Boswell v. Mayer*, 169 F.3d 384, 388 (6th Cir. 1999) (inmate stated separate First

Amendment claim, based on right to receive mail, though claim failed on the merits).

The Fifth Circuit, in contrast, does not recognize any free speech cause of action arising out of the opening of an inmate's legal mail outside his presence. In *Brewer v. Wilkinson*, 3 F.3d 816 (5th Cir. 1993), *cert. denied*, 510 U.S. 1123 (1994), that court held "that the violation of [a] prison regulation requiring that a prisoner be present when his incoming legal mail is opened and inspected is not a violation of a prisoner's constitutional rights." *Id.*, 3 F.3d at 825.[4]

And recent Seventh Circuit decisions take the *Brewer* approach (although they do not mention it). As noted by petitioners (petition, at 10-11), in *Lewis v. Cook County Bd. of Commissioners*, 6 Fed. Appx. 428, 430 (7th Cir. 2001), the dismissal of an inmate's legal-mail-opening claim was affirmed, because he had no basis for a separate First Amendment free speech claim (and had not pled actual injury to support an access-to-courts claim). In *Kaufman v. Karlen*, No. 07-2712, 2008 WL 744140 (7th Cir. March 20, 2008), an inmate who had argued neither interference with his right to counsel nor denial of his right of access to courts lost his mail-opening case initially and on appeal. In affirming the judgment against him, the Seventh Circuit did not explicitly consider whether opening the inmate's incoming legal mail outside his presence could amount to a separate free speech violation, but the district court had analyzed that issue at length, and concluded that the First

---

[4] Both the Eleventh Circuit in this case, *Al-Amin*, 511 F.3d at 1328-1329, and the Third Circuit in *Bieregu*, 59 F.3d at 1458, acknowledged but refused to follow *Brewer*.

Amendment does not afford inmates an absolute right to be present when their legal mail is opened. *Kaufman v. Karlen*, No. 06-C-205-C, 2007 WL 1821098, at *19-21 (W.D. Wis. June 21, 2007). *Accord Vasquez v. Raemisch*, 480 F. Supp.2d 1120, 1138-1141 (W.D. Wis. 2007); *West v. Endicott*, No. 06-C-763, 2008 WL 906225, at *3-7 (E.D. Wis. March 31, 2008).[5]

Further confusing the situation, the circuits disagree on what kinds of mail qualify as "legal" mail. *Wolff* itself only concerned attorney mail. *Id.*, 418 U.S. at 576-577. While recognizing that the point of opening legal mail in an inmate's presence is to protect the attorney-client privilege and preserve confidentiality, the Eighth Circuit has cautioned that "the mere fact that a letter comes from a legal source is insufficient to indicate that it is confidential and requires special treatment." *Harrod v. Halford*, 773 F.2d 234, 236 (8th Cir. 1985), *cert. denied*, 476 U.S. 1143 (1986). The Sixth Circuit takes a broader view, holding that at least some mail from the State Attorney General's office is to be opened in the inmate's presence, *Boswell*, 169 F.3d 389-390; *Muhammad v. Pitcher*, 35 F.3d 1081, 1085-1086 (6th Cir. 1994), and that "mail from a court constitutes 'legal mail' and cannot be opened outside the presence of a prisoner[.]" *Sallier*, 343 F.3d at 877. In the Third Circuit, too, incoming court mail must be opened in the inmate's presence. *Bieregu v. Reno*, 59 F.3d 1445 (3d Cir. 1995). But inmates' incoming court mail, being largely a matter of public record, is not deemed

---

[5] *But see Antonelli v. Sheahan*, 81 F.3d 1422, 1432 (7th Cir. 1996) (inmate's allegations, regarding both incoming and outgoing mail, sufficient to state claims for "violations of free speech and association").

"legal mail" in the Ninth Circuit, *Keenan v. Hall*, 83 F.3d 1083, 1084 (9th Cir. 1996), or in the Seventh Circuit, *Martin v. Brewer*, 830 F.2d 76, 78 (7th Cir. 1987). *See also McCain v. Reno*, 98 F. Supp.2d 5, 7-8 (D. D.C. 2000) (Constitution does not require same treatment for court mail as for attorney mail).

III. There Is No Constitutional Basis For Requiring Inmates' Incoming Legal Mail To Be Opened And Inspected In Their Presence.

"The policy that incoming confidential legal mail should be opened in inmates' presence ... serves the prophylactic purpose of assuring them that confidential attorney-client mail has not been improperly read in the guise of searching for contraband." *Gardner v. Howard*, 109 F.3d 427, 431 (8th Cir. 1997). Such policies, like Georgia's in this case, are now widespread. However, just because something is dictated by policy, or required under state regulations, it does not follow that it is mandatory as a matter of constitutional law. *Cf. Bell v. Wolfish*, 441 U.S. 520, 554 (1979) (Constitution does not mandate "lowest common denominator" security standard, whereby practice permitted at one institution must be permitted everywhere).

Judicially sanctioned policies calling for incoming legal mail to be opened in inmates' presence appear to be traceable to *Smith v. Robbins*, 328 F. Supp. 162 (D. Me. 1971), *aff'd in relevant part*, 454 F.2d 696 (1st Cir. 1972). There, the parties had agreed that incoming legal mail was subject to being opened and inspected (but not read) by prison officials; the only question before the court was whether the addressee inmate had to be allowed to watch. Noting that part of the Sixth Amendment guarantee of the effective

assistance of counsel is "the opportunity for free and private communication between the attorney and his client," the district court stressed that – notwithstanding the express prohibition on reading incoming attorney mail – "if the opening occurs in the absence of the inmate, his attorney will still be reluctant to communicate fully with his client because of the fear that his correspondence will be read by others." *Id.*, 328 F. Supp. at 164-165. This, the court concluded, "clearly" had no security implications, but would have a chilling effect on the inmates' right to effective assistance of counsel. *Id.*

Affirming, the First Circuit focused on the "apprehensions" of inmates and their attorneys and discounted the warden's concerns: "The court does not suggest that the warden is untrustworthy. Rather, it is that a prisoner, and possibly some attorneys, may feel, if only to a small degree, that someone in the chain of command may not be trusted, and that the resulting fear may chill communications between the prisoner and his counsel." *Smith*, 454 F.2d at 697. So, the court said, "the burden must be on the warden to show a need for any act which could produce even a suspicion of intrusion." *Id.*

Smith was cited with approval by the concurring judges in *Moore v. Ciccone*, 459 F.2d 574, 578 (8th Cir. 1972). Soon thereafter, in *McDonnell v. Wolff*, 483 F.2d 1059, 1066-1067 (8th Cir. 1973), the Eighth Circuit followed the *Moore* concurrence. On further review, this Court did not specifically endorse the original Sixth Amendment rationale for requiring inmates to be present for the opening and inspecting of their incoming legal mail, nor, indeed, did the Court definitively identify any other constitutional basis for such policies. *Wolff v. McDonnell*, 418 U.S. 539, 575-576 (1974). Rather, as mentioned earlier, the

Court concluded that Nebraska officials had "done all, and perhaps even more, than the Constitution requires." *Id.*, at 577. Nevertheless, over time, the dicta in *Wolff* have taken on a life of their own.

By now, the Sixth Amendment rationale originally put forward to justify open-in-inmates'-presence requirements has been stretched beyond recognition (if not altogether forgotten). These days, all attorney mail, and sometimes court mail and other "official" mail, tends to receive preferential handling. But the "reach" of the Sixth Amendment "is only to protect the attorney-client relationship from intrusion in the criminal setting." *Wolff*, 418 U.S. at 576. The Sixth Amendment does not even extend to *habeas corpus* proceedings (in which many inmates are involved), *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987), let alone to other legal settings or proceedings. So, to the extent that attorney-inmate communications outside the criminal context are confidential, it is not because the Sixth Amendment protects them. The attorney-client privilege may apply to such communications, but that privilege derives from the common law, not from the Constitution. *See Swidler & Berlin v. United States*, 524 U.S. 399, 403 (1998); *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981).

More broadly, according primacy to inmates' feelings, and putting the onus on prison officials to justify anything "which could produce even a suspicion of intrusion," *Smith*, 454 F.2d at 697, is dramatically at odds with the Court's approach to prisoners' rights cases. When the constitutionality of prison officials' actions or policies is challenged, it is the challengers – not the proponents – who bear the burden of proof. *E.g.*, *Overton v. Bazetta*, 539 U.S. 126, 132 (2003) (burden "is not on the State to prove the validity of prison regulations but on the prisoner to

disprove it"). After all, the rule is that reading inmates' mail is prohibited; and under the Court's precedents, it cannot simply be assumed that correctional officers or mailroom staff will disregard that prohibition.[6] And it is the decisions of prison officials on how best to run correctional institutions – not the "apprehensions" of inmates – that are entitled to considerable deference. *E.g., Beard v. Banks*, 126 S.Ct. 2572, 2578 (2006); *Jones v. N.C. Prisoners' Labor Union*, 433 U.S. 119, 132 (1989).

Moreover, if the constitutionality of prison policies regarding the inspection of incoming mail hinges on how inmates feel about those policies, why should legal mail be singled out for special handling? There are other types of sensitive, even privileged, incoming mail, such as communications from spouses or members of the clergy. Those are not opened and inspected in the inmates' presence, much as inmates and their correspondents might prefer otherwise. *See* Asha Bandele, *The Prisoner's Wife: A Memoir* 34, 35 (1999) ("Rashid and I gave ourselves up to each other,

---

[6] As a practical matter, the volume of incoming mail, most of which is not "legal," is too great for whoever is inspecting it to spend time zeroing in on and reading any particular item, even if the inspector were inclined to do so. According to one study, inmates sent and received an average of four pieces of mail each per week in 2005. Heath C. Hoffmann, *et al.*, *Communication Policy Changes in State Adult Correctional Facilities From 1971 to 2005*, CRIMINAL JUSTICE REVIEW (2007), at 53. The Georgia State Prison, where this case arose, has the capacity to house 1,334 felons, and therefore likely must process over 5,000 pieces of inmate mail per week. Legal mail would be a small percentage of the total. *See O'Keefe v. Van Boening*, 82 F.3d 322, 323 (9th Cir. 1996) ("legal mail constitutes only about five percent of all mail").

publicly, in monitored phone calls, in scrutinized letters, and finally on videotape in prison visiting rooms.... [S]trangers and even enemies could read our every letter[.]") Neither the Court of Appeals in this case, nor any other of the lower courts that mandate special treatment for legal mail, has attempted to explain how the First Amendment supports such a distinction.

Overall, the privacy rights of inmates are curtailed in many respects. *See Hudson v. Palmer*, 468 U.S. 517 (1984). The Constitution does not mandate that inmates be present when their cells are searched, *see Block v. Rutherford*, 468 U.S. 576, 590-591 (1984); *Bell v. Wolfish*, 441 U.S. 520, 555 (1979), and it also does not mandate that inmates be present when their incoming legal mail is opened and inspected (but not read).

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

THOMAS W. CORBETT, JR.
Attorney General

JOHN G. KNORR, III
Chief Deputy Attorney General

CLAUDIA M. TESORO*
Senior Deputy Attorney General
**Counsel of Record*

Office of Attorney General
21 South 12th St., 3d Floor
Philadelphia, Pa. 19107
(215) 560-2908

DATE: June 30, 2008 Counsel for *Amici Curiae*